

Karen T. Reidy
Attorney
Federal Advocacy

1133 Nineteenth Street, NW
Washington, DC 20036
202 736-6489
Fax 202 736-6359



March 30, 2004

By Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Written *Ex Parte*; In the Matter of Provision of Directory Listing Information
under the Telecommunications Act of 1934, As Amended; CC Docket No. 99-273.

Dear Ms. Dortch,

MCI respectfully submits this written *ex parte* for inclusion in the above-referenced proceeding, in response to the February 13, 2004 written *ex parte* of BellSouth Corporation¹ regarding the pending Petition for Clarification, or in the Alternative, Reconsideration filed jointly by BellSouth and SBC.²

In its *ex parte* letter BellSouth argues that the Federal Communications Commission's ("Commission") Directory Assistance Listing Order (*DAL Order*)³ contains conflicting language as to whether a local exchange carrier ("LEC") may impose use restrictions on those entities obtaining the directory assistance listings ("DAL") from the LEC pursuant to Section 251(b)(3) of the Act. BellSouth requests that the Commission permit LECs to impose three restrictions on carriers purchasing DAL from it, each of which MCI addresses below: (1) resale of DA listing to directory publishers; (2) bulk resale/multiple use; and (3) use of DA listings for non-DA purposes.⁴ Imposition of such use restrictions by a providing LEC are clearly prohibited by the *DAL Order* and the Commission should not reverse its prior decision on this matter.

¹ Letter from Angela N. Brown, Regulatory Counsel for BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 99-273 (filed February 13, 2004) ("BellSouth Letter").

² Petition for Clarification or, in the Alternative, Reconsideration, filed by SBC and BellSouth, CC Docket No. 99-273 (filed March 23, 2001).

³ Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC Docket No. 99-273, *First Report and Order*, 16 FCC Rcd 2736 (2001) (DAL Order).

⁴ BellSouth Letter, pp. 1-2.

Contrary to BellSouth's claims, the *DAL Order* consistently prohibits *the LEC* from imposing restrictions on the use of DA listings. The *DAL Order* clearly states:

...section 251(b)(3)'s requirement of nondiscriminatory access to a LEC's DA database does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put. Once carriers or their agents obtain access to the DA database, they may use the information as they wish, *as long as they comply with applicable provisions of the Act or [FCC] rules.*⁵

BellSouth, however, contends that the *DAL Order* allows the providing LEC to impose use restrictions in its interconnection agreements. In support of its argument BellSouth cites the following, "...providers continue to be governed by their agreements with their carrier-principal and by the state-law principles that govern the construction of those agreements."⁶ BellSouth's argument is without merit. The cited language concerns the relationship, and more specifically the agreement, between the DA provider and the competing LEC(s) or IXC(s) on whose behalf it is obtaining the data. As the Commission further explains in the *DAL Order*, it makes no difference whether state law deems the DA provider to be an "agent" or "independent contractor." In either circumstance, "...[t]he rights of the DA provider are derivative of the rights of its carrier-principal, and the DA provider [] may use the information it obtains subject to the limitations set forth in its agreements with its principal."⁷ Agency agreements are not subject to section 251(b)(3) requirements. Essentially, these agreements provide a vehicle for carriers entitled to the data pursuant to section 251(b)(3) to ensure that their non-carrier *agents* do not use the data in a manner that a carrier itself is prohibited under state or federal law.

As discussed more fully below, the Commission should not contravene the statutory language and objective, and reverse FCC precedent, by permitting LECs to impose use or resale restrictions on competing carriers obtaining DA listings from the LEC pursuant to section 251(b)(3).

1. Resale of DA Listings to Directory Publishers

BellSouth alleges that "[s]ome DA providers that purchase DA listings from BellSouth pursuant to Section 251(b)(3) are seeking to resell BellSouth's DA listings to directory publishers."⁸ BellSouth urges the Commission to allow LECs to "prohibit DA providers and their agents from using DA listings obtained pursuant to Section 251(b)(3) for directory publishing purposes."⁹ BellSouth notes that such use of DAL is not permitted by FCC rulings.¹⁰ Therefore, BellSouth's proposed contractual use restriction is unnecessary at best.

As discussed above, the Commission has determined that carriers may use the data for purposes not prohibited by law, as presumably the law does not favor one carrier over another. The FCC has clearly stated that "[n]either the statutory language nor [FCC] implementing rules allow requesting LECs to use listing information obtained pursuant to section 251(b)(3) to

⁵ DAL Order, para. 28.

⁶ BellSouth Letter, p. 2, citing DAL Order, para. 28.

⁷ DAL Order, para. 27, n. 73.

⁸ BellSouth Letter, p. 3.

⁹ Id., p. 4.

¹⁰ Id., p. 3.

publish telephone directories...To the extent that a requesting LEC wishes to publish its own directories, the manner in which it may use another LEC's listing information, and the compensation that the requesting LEC must pay to the providing LEC for the right to use that information in publishing a directory, is governed by section 222(e) and [FCC] rules implementing that section."¹¹ Moreover, the Commission has concluded that "competitors receiving LEC directory assistance information would be held to the same standards as the providing LEC in terms of the types of information that they could legally release to third parties."¹²

The Commission should not allow a LEC, through contractual terms and conditions, to decide and then enforce what is or is not a violation of Commission rules and orders. If BellSouth is aware of any violations with the Commission's rulings it should bring such noncompliance to the attention of the Commission for investigation. Interestingly, BellSouth has not provided any details supporting its assertion nor, to MCI's knowledge, has it brought any FCC enforcement action.

2. Bulk Resale/Multiple Use

Next, BellSouth complains that it is losing revenue as a result of competitors reselling DA listings below BellSouth's prices.¹³ BellSouth claims that "the DA listings contained in [its] DA database are not published resources" and not available outside the "limited" purposes as required by the 1996 Act.¹⁴ It implies that the *sole* "goal of nondiscriminatory access to DA is to ensure that end users, no matter what LEC provides their service, will have access to DA listings."¹⁵ But, the purpose of the statutory provision was not so limited. Competition is a primary objective of the Act's provisions and resale restrictions obstruct that goal.

The Commission's mission in adopting the *DAL Order* was not to protect BellSouth's revenue source. BellSouth's suggestion is particularly offensive when one stops to think that incumbent LECs obtained this data as a result of their historical monopoly of the local market, not the development of some innovative software as analogized by BellSouth. As is evident from the passage of Section 251(b)(3), Congress did not ascribe to BellSouth's view of the proprietary nature of this data. Section 251(b)(3) was not solely established to ensure that end users have access to DA listings regardless of their carrier, as BellSouth asserts. Competition in the DA market was a crucial goal, and the 1996 Act requires the Commission to "remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well."¹⁶

¹¹ Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, CC Docket Nos. 96-115, 96-98, 99-273, *Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-273*, 14 FCC Rcd. 15550, para. 124 (1999) ("Third Report and Order").

¹² DAL Order, para. 29, citing Local Competition Second Report and Order, 11 FCC Rcd. at 19461-62.

¹³ BellSouth Letter, p. 4.

¹⁴ *Id.*, p. 6.

¹⁵ *Id.*, p. 5.

¹⁶ DAL Order, para. 10.

The Commission furthered this objective by concluding that multi-use restrictions “...[s]ubstantially increase the costs of providing a competitive directory assistance product, thereby reducing the salutary effects arising from the presence in the market of competitive DA providers.”¹⁷ Likewise, as the Commission has explained, “[t]he directory assistance market will not be fully competitive as long as the incumbent LECs have the ability to leverage their monopoly control of their DA databases into market dominance.”¹⁸ Bestowing LECs with a protected revenue source in DAL will foster rather than eliminate the incumbent LECs dominance in the DA market, resulting in their continued control over the development and pricing of services/products using DAL.¹⁹

To that end, access to DAL at cost-based rates is essential for competing providers to offer accurate, high quality, and reasonably priced service to end-users customers. BellSouth notes that its current tariffed rate for DAL is \$.04 per listing plus a \$150 per month per state recurring fee, while apparently others are selling the listings for \$.01 per listing or less.²⁰ Incumbent LECs have the incentive to charge competitors prices that are significantly higher than the actual costs, charging, as BellSouth does, between two and seven cents per listing. But in states where cost studies have been performed, the state commissions have found that charging \$0.01 per listing is not a below cost rate, and the price is typically set at a fraction of a penny.

The following states have concluded cost studies and determined the following rates to be applicable:

State	Initial- per listing	Update- per listing	Additional charges & Notes
Texas	\$0.0011	\$0.00141	
Minnesota	\$0.0083	\$0.0186	
New York ²¹	\$0.0014	\$0.0051	
Washington	\$0.0073	\$0.0171	

The competitive market for complete and accurate DAL, which BellSouth seeks to prevent, is in the public interest as competition drives price to cost with minimal regulation. Unfortunately, there currently is no "market" for DAL because the incumbent LECs still control

¹⁷ *Id.*, para. 28.

¹⁸ *Id.*, para. 3.

¹⁹ Moreover, if the FCC were to grant LECs the rights to restrict the resale or use of DAL, the imbalance resulting from the incumbents' market power would create a discriminatory effect. For example, it is MCI's experience that generally competitive LECs provide data for their customer base to the ILECs for free with no restrictions. This is done because CLECs recognize the importance of ensuring the inclusion of their local service customers' listings in the ILEC DA databases.

²⁰ BellSouth Letter, p. 4, n. 13.

²¹ Under the New York scheme, DAL pricing is based on lump sum figures: Initial full extract via electronic file transfer, non-recurring is \$13,464. Daily updates, \$3,637 per month. Stated on a per record basis, this would equate to a full initial transfer of \$0.0014 per listing and daily updates monthly rate of \$0.0051 per listing based on a base file of 9,900,000 listings and an average monthly update of 713,000 records. New York Verizon Tariff #916, issued pursuant to NYPSC Order No. 98-C-1 357 (February 8, 2000).

the vast majority of the data as a result of their historical and local monopolies. That is why MCI has urged states to initiate cost proceedings on DAL and why the Commission should deny BellSouth's petition.

3. Use of DA for Non-DA Purposes

In addition, BellSouth requests that it be permitted to prevent the use of DAL by competing providers for "non-DA purposes," citing direct marketing, telemarketing, and sales solicitations as examples of such use.²² As the Commission concluded, providing LECs are not limited in use of the DA database to directory assistance purpose and there is "...no basis in the Act or our rules for imposing such a restriction on competing providers."²³ The scant facts BellSouth provides in its ex parte letter to describe two scenarios of consumer impact do not justify a reversal of the Commission's decision.

First, in which BellSouth attempts to underscore the difficulty it encounters when trying to police the dissemination of its customers' numbers, BellSouth indicates that one of its "non-published" customers was contacted by a telemarketer.²⁴ What is unclear from BellSouth's description is how the telemarketer obtained the non-published listing. As the Commission is aware, LECs do not release non-published numbers to the public *or to other LECs or DA providers pursuant to section 251(b)(3)*.²⁵ Perhaps BellSouth inadvertently released the number or its system for protecting it failed.²⁶ Nonetheless, one thing is certain, BellSouth's inability to impose use restrictions was not the cause of the problem because the number should never have been released by BellSouth so as to raise concerns about use restrictions.

Next, BellSouth cites to a Federal Trade Commission (FTC) investigation of an unauthorized Internet billing and collections scheme.²⁷ Yet, BellSouth fails to explain how the scheme was caused by Section 251(b)(3) access to DAL, why FTC enforcement is not sufficient to address this issue, and how its contractual restrictions on the use of DAL for telemarketing would prevent this type of scheme in the future.

Finally, BellSouth continues to use telemarketing as justification for contractually imposed use restrictions despite that fact that the FCC and FTC have addressed consumer privacy concerns associated with unwanted telemarketing in their recent TCPA and TSR Orders, respectively, by adopting a national do-not-call list.²⁸ Moreover, relying on contractual terms and conditions is not a practical means to protect consumer interests with regard to DAL. Some

²² BellSouth Letter, pp. 6-7.

²³ DAL Order, para. 29.

²⁴ BellSouth Letter, p. 6.

²⁵ See DAL Order, para. 41["Directory assistance operators obtain the information from databases that contain the names, addresses, and telephone numbers of telephone exchange service subscribers within particular geographic areas *that do not elect to have unpublished numbers*."] Emphasis added. See also, 47 C.F.R. §1.217(c)(3)(iv).

²⁶ MCI is unaware of any encrypted system to which BellSouth refers. BellSouth only provides MCI with NPA/NXX, name and address for unpublished numbers.

²⁷ BellSouth Letter, p. 7.

²⁸ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, CC Docket No. 02-278, 18 FCC Rcd 14014 (2003)("TCPA Order") and *Telemarketing Sales Rule, Final Rule*, Federal Trade Commission, 68 Fed. Reg. 4580 (2003)("TSR Order"). Moreover, BellSouth does not even provide evidence that DAL is a major resource for marketers.

LECs may not have the bargaining power to ensure sufficient protection²⁹ and, to the extent other LECs do, their interests may not be aligned with consumers' interests. For example, some of the restrictions that incumbent LECs have attempted to impose on competing LECs would have curb beneficial innovation in services using this data.³⁰ The Commission should not allow incumbent LECs, through contract terms and provisions, to become the unilateral judge to decide what is an appropriate use of DAL.

In conclusion, the Commission should deny BellSouth's pending petition in the DAL proceeding. LECs should not be permitted, through contractual use and resale restrictions, to obstruct or control the competitive provision and advancement of services using DAL.

Sincerely,

/s/ Karen Reidy

cc: Michelle Carey
William Dever
Rodney McDonald

²⁹ See *supra*, n. 20.

³⁰ See MCI Ex Parte Notice, CC Docket No. 99-273, p. 3 of attached presentation (filed April 23, 2003). [Examples of previous innovative services using DAL data include nationwide DA (never existed before with "local" use restrictions), automated DA services (never existed with "live operator" restriction), Caller ID services, Screen Pops on inbound calls, and call completion services.]